2003

Clifton W. PANOS, Petitioner and Plaintiff, vs. THIRD JUDICIAL DISTRICT COURT of Tooele County and The Hon. Randall N. SKANCHY, Respondents, and Jennifer Ann CASTLE, Real Party in Interest and Defendant: Reply Brief

Utah Supreme Court

Brent M. Johnson; Paul H. Matthews; Attorneys for the Respondents.
Clifton W. Panos; Pro Se.

COPY

IN THE SUPREME COURT OF THE STATE OF UTAH

Clifton W. PANOS,

Petitioner/Plaintiff,

vs.

THIRD JUDICIAL DISTRICT COURT of Tooele County,

and

The Hon. Randall N. SKANCHY,

Respondents,

and Jennifer Ann CASTLE,

Real Party in Interest/ Defendant.

Case No. 20030344-SC

ADDENDUM TO REPLY BRIEF OF PETITIONER ON REHEARING

ON GRANT OF REHEARING ON PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS DIRECTING THAT RESPONDENT DISTRICT COURT AND JUDGE LACK JURISDICTION TO HEAR THIS SMALL CLAIMS ACTION ON APPEAL IN TRIAL DE NOVO, AND FURTHER REQUIRING THAT APPEALED CAUSE BE DISMISSED

Brent M. Johnson, General Counsel to
the Administrative Office of the Courts
and Attorney for the Respondents
450 S. State Street, Suite N31
P. O. Box 140241
Salt Lake City, UT 84114-0241

Clifton W. PANOS pro se
Petitioner and Plaintiff
996 Oak Hills Way
Salt Lake City, UT
84108-2022

Paul H. Matthews & Associates, P.C.
Counsel to Real Party in Interest/Defendant
10 W. Broadway, Suite 700
Salt Lake City, UT 84101-2060

COUR

Table of Contents

Exhibit "A"

PAUL H. MATTHEWS & ASSOCIATES, P.C.

10 West Broadway, Suite 700
Salt Lake City, UT 84101-2060
Telephone: (801) 355-7007
Facsimile: (801) 355-6006

February 12, 2003

Third District Court
Tooele County,
Small Claims Department
47 South Main #141
Tooele, Utah 84074

RE: **Panos v. Castle**
Civil No. 02-31
Our File No. Allied-413

Dear Clerk of the Court:

Please file the enclosed original:

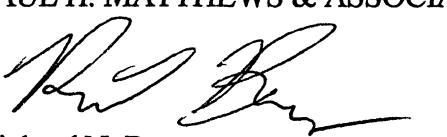
0383000028

1. **NOTICE OF APPEAL.**

Please also find enclosed our check in the amount of $70.00 for the appeal. Please return your receipt in the enclosed self-addressed stamped envelope.

Very truly yours,

PAUL H. MATTHEWS & ASSOCIATES, P.C.



Richard N. Barnes

RNB:jbl
Enclosures
Letter to Court 01.wpd

Exhibit "B"

Paul H. Matthews (#2122)
Richard N. Barnes (#8892)
W. Kevin Tanner (#8872)
PAUL H. MATTHEWS & ASSOCIATES, P.C.
Attorneys for Defendant
10 West Broadway, Suite 700
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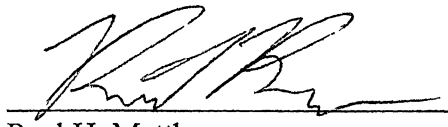
THIRD DISTRICT COURT, STATE OF UTAH
TOOELE COUNTY, SMALL CLAIMS DEPARTMENT
47 South Main, Tooele, Utah 84074

CLIFTON W. PANOS, Plaintiff, v. JENNIFER ANN CASTLE, Defendant.	**NOTICE OF APPEAL** Case No. 02-31

Defendant appeals to the District Court the final judgment entered in this case by Judge William E. Pitt of this court.

DATED this 12th day of February, 2003.

PAUL H. MATTHEWS & ASSOCIATES, P.C.



Paul H. Matthews
Richard N. Barnes
W. Kevin Tanner
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 12 day of February, 2003, I caused a true and correct copy of the foregoing **NOTICE OF APPEAL** to be mailed through United States mail, postage prepaid, to the following:

Clifton W. Panos
996 Oakhill Way
Salt Lake City, UT 84108
Planitiff

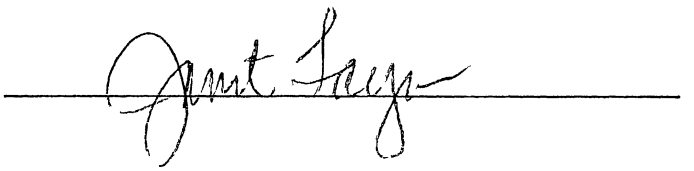


Exhibit "C"

A.L.R. — Right of independent expert to refuse to testify as to expert opinion, 50 A.L.R.4th 680.

Right of indigent defendant in state criminal case to assistance of expert in social attitudes, 74 A.L.R.4th 330.

Right of indigent defendant in state criminal case to assistance of chemist, toxicologist, technician, narcotics expert, specialist in substance analysis, 74 A.L.R.4th 388.

Right of indigent defendant in state criminal prosecution to ex parte in camera hearing on request for state-funded expert witness, 83 A.L.R.5th 541.

ARTICLE VIII. HEARSAY

Rule 801. Definitions.

The following definitions apply under this article:

(a) *Statement.* A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant.* A "declarant" is a person who makes a statement.

(c) *Hearsay.* "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) *Statements which are not hearsay.* A statement is not hearsay if:

(d)(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with the declarant's testimony or the witness denies having made the statement or has forgotten, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(d)(2) *Admission by party-opponent.* The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

(Amended effective October 1, 1992.)

Advisory Committee Note. — Subsection (a) is in accord with Rule 62(1), Utah Rules of Evidence (1971).

Subsection (b) is in accord with Rule 62(2), Utah Rules of Evidence (1971). The hearsay rule is not applicable in declarations of devices and machines, e.g., radar. The definition of "hearsay" in subdivision (c) is substantially the same as Rule 63, Utah Rules of Evidence (1971).

Subdivision (d)(1) is similar to Rule 63(1), Utah Rules of Evidence (1971). It deviates from the federal rule in that it allows use of prior statements as substantive evidence if (1) inconsistent or (2) the witness has forgotten, and does not require the prior statement to have been given under oath or subject to perjury. The former Utah rules admitted such statements as an exception to the hearsay rule. See California v. Green, 399 U.S. 149 (1970), with respect to Subdivision (d)(1) is as originally promulgated by the United States Supreme Court with the addition of the language "or the witness denies having made the statement or has forgotten" and is in keeping with the prior Utah rule and the actual effect on most juries.

Subdivision (d)(1)(B) is in substance the same as Rule 63(1), Utah Rules of Evidence (1971). The Utah court has been liberal in its interpretation of the applicable rule in this general area. State v. Sibert, 6 Utah 2d 198, 310 P.2d 388 (1957).

Subdivision (d)(1)(C) comports with prior Utah case law. State v. Owens, 15 Utah 2d 123, 388 P.2d 797 (1964); State v. Vasquez, 22 Utah 2d 277, 451 P.2d 786 (1969).

The substance of subdivision (d)(2)(A) was contained in Rules 63(6) and (7), Utah Rules of Evidence (1971), as an exception to the hearsay rule.

Exhibit "D"

Paul H. Matthews (#2122)
Richard N. Barnes (#8892)
W. Kevin Tanner (#8872)
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Attorneys for Defendant
10 West Broadway, Suite 700
Salt Lake City, UT 84101-2060
Telephone: (801) 355-7007
Facsimile: (801) 355-6006

THIRD DISTRICT COURT, TOOELE COURT
TOOELE COUNTY, STATE OF UTAH
47 South Main, Tooele, Utah 84074

CLIFTON W. PANOS, Plaintiff, v. JENNIFER ANN CASTLE, Defendant.	:	**AFFIDAVIT** Case No. 038300082 ST Judge Randall Skanchy

---

COUNTY OF SALT LAKE)
)ss.
STATE OF UTAH)

I, Janet Layosa , having been duly sworn, depose and state as follows:

1. I am over the age of twenty-one years and am an individual residing in Salt Lake County, Utah.

2. I have personal knowledge of the facts contained in this affidavit.

3. On February 12, 2003 I called the Tooele Justice Court directly and spoke to a Justice Court Clerk.

4. I specifically asked the Justice Court Clerk what the appropriate filing fee was for an appeal from a Justice Court small Claim's decision that is the subject matter of the present lawsuit.

5. I was informed that the filing fee would be $70.00 and that I should forward a check in that amount with the Notice of Appeal filed in the present matter.

6. I was not told by the Justice Court Clerk of any additional fees to this $70.00.

7. Acting in reliance on the statements made by the Justice Court Clerk, I requested a check in the amount of $70.00 which was attached to the letter from Richard Barnes in his letter transmitting the Notice of Appeal to the Justice Court.

Further saith naught your affiant.

DATED this 27 day of February, 2003.

Janet Layosa

STATE OF UTAH)
:ss.
COUNTY OF SALT LAKE)

SUBSCRIBED and sworn to before me this 27 day of February, 2003.

Notary Public

My Commission Expires: April 27, 2005

Notary Public
LAURI C. PARKE
10 West Broadway, Suite 750
Salt Lake City, Utah 84101-2046
My Commission Expires
April 27, 2005
State of Utah

Exhibit "E"

PROCEEDINGS

02-13-03 Case filed by nevag nevag
02-13-03 Judge SKANCHY assigned. nevag
02-13-03 PRETRIAL CONF ON SC APPEAL JC scheduled on March 03, 2003 at 01:30 PM in Room 321 with Judge SKANCHY. nevag
02-13-03 Note: Address changed from nevag
02-13-03 Note: Address changed to 1947 North 40 West Tooele UT 84074 nevag
02-13-03 Note: Address changed from nevag
02-13-03 Note: Address changed to 996 Oak Hills Way Tooele UT 84074 nevag
02-13-03 Notice - NOTICE for Case 038300082 ID 5516736 nevag
PRETRIAL CONF ON SC APPEAL JC.
Date: 3/3/03
Time: 01:30 p.m.
Location: Room 321
TOOELE COUNTY COURTHOUSE
47 SOUTH MAIN
TOOELE, UT 84074
Before Judge: RANDALL SKANCHY
The reason for the change is Clerk error.
02-13-03 PRETRIAL CONF ON SC APPEAL JC scheduled on March 03, 2003 at 01:30 PM in Room 321 with Judge SKANCHY. nevag
02-13-03 PRETRIAL CONF ON SC APPEAL JC Cancelled.
02-13-03 Filed: Trial De Novo on Appeal from Justice Court nevag
02-13-03 Fee Account created Total Due: 70.00 luci
02-13-03 TRIAL DE NOVO Payment Received: 70.00 luci
Note: Code Description: TRIAL DE NOVO; Mail Payment;
02-13-03 Filed: Notice of Appeal, Justice Court #02-31 neva
02-19-03 Filed: File from Justice Court received neva
02-19-03 Filed: Faxed letter from Richard Barnes re: conversation with clerk on 2-18-03. neva
02-20-03 Fee Account created Total Due: 3.50 luci
02-20-03 COPY FEE Payment Received: 3.50 luci
02-20-03 Note: Address changed from 996 Oak Hills Way Tooele UT 84074 neva
02-20-03 Note: Address changed to 996 Oak Hills Way Salt Lake City UT 84108 neva
02-20-03 Note: Plaintiff came in and received a copy of the notice for hearing on 3-3-03. neva
02-20-03 Filed: Letter of Notice of Hearing on 3-3-03 (to plaintiff) returned to court. Address is wrong. neva
02-20-03 Filed: Letter from Richard Barnes (original) neva
02-24-03 Filed: Request for Continuance (PLA) neva
02-24-03 Filed: Motion to Dismiss Appeal (Clifton Panos) neva
02-24-03 Filed: Supplement to Plaintiff's Motion to Dismiss Appeal neva
02-26-03 PRETRIAL ON SC TRIAL DE NOVO scheduled on March 03, 2003 at 01:30 PM in Room 321 with Judge SKANCHY. she
02-26-03 PRETRIAL CONF ON SC APPEAL JC Cancelled.
02-27-03 Filed: Copy of letter from attorney for defendant to Justice Court. nev

2-27-03	Filed: Letter to Court from plaintiff dated 2-27-03	nevag
2-28-03	Note: On 2-27-03, after learning that Judge Skanchy had approved the request for continuance filed by Mr. Panos, I called both parties to notify them that the hearing would be cancelled for 3-3-03 and that they would be given notice of the reset date.	nevag
-28-03	PRETRIAL ON SC TRIAL DE NOVO Cancelled.	
-28-03	Notice - NOTICE for Case 038300082 ID 5531253 PTC/MOTION TO DISMISS is scheduled. Date: 03/17/2003 Time: 01:30 p.m. Location: Room 321 TOOELE COUNTY COURTHOUSE 47 SOUTH MAIN TOOELE, UT 84074 Before Judge: RANDALL SKANCHY	nevag
-28-03	PTC/MOTION TO DISMISS scheduled on March 17, 2003 at 01:30 PM in Room 321 with Judge SKANCHY.	nevag
-28-03	Filed: Memorandum in Opposition to Plaintiff's Motion to Dismiss Appeal	lucilleh
-11-03	Filed: Request for Continuance (Clifton W. Panos)	nevag
-12-03	Note: Mr. Panos filed a Request for Continuance of 3-17-03 hearing. Per RNS, if both parties stipulate in writing, the continuance may be granted.	nevag
17-03	Filed: Letter from Mr. Panos with attachment, faxed.	nevag
17-03	Filed: Letter from Mr. Panos, original, with attachment.	nevag
17-03	Filed: Notice to Submit for Decision	juliek
17-03	TRIAL DE NOVO scheduled on April 08, 2003 at 09:00 AM in Room 321 with Judge SKANCHY.	tawnil
17-03	Minute Entry - Minutes for PTC/ MOTION TO DISMISS Judge: RANDALL SKANCHY Clerk: tawnil PRESENT Plaintiff(s): CLIFTON PANOS Defendant's Attorney(s): RICHARD N BARNES Video Tape Number: 2003-017 Tape Count: 3:21	tawnil

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HEARING

This matter comes now before the court for pretrial on trial de novo and for hearing on plaintiff's motion to dismiss appeal. The Court having heard argument from respective parties, denies the motion to dismiss the appeal. Trial de novo is set for 4-8-03 at 9:00 am. The parties are aware that this matter is double-set, and they are to keep in contact with this court.

Exhibit "F"

3RD DISTRICT COURT - TOOELE COUNTY
TOOELE COUNTY, STATE OF UTAH

CLIFTON PANOS, Plaintiff,	:	NOTICE OF PTC/MOTION TO DISMISS
vs.	:	Case No: 038300082 ST
JENNIFER ANN CASTLE, Defendant.	:	Judge: RANDALL SKANCHY Date: February 28,2003

Pretrial Conference on Trial de Novo + Motion to Dismiss
PTC/MOTION TO DISMISS is scheduled.
Date: 03/17/2003
Time: 01:30 p.m.
Location: Room 321
TOOELE COUNTY COURTHOUSE
47 SOUTH MAIN
TOOELE, UT 84074
Before Judge: RANDALL SKANCHY

Dated this 28th day of February, 2003.

Neva L. Gardner

District Court Deputy Clerk

IF YOU NEED AN INTERPRETER, PLEASE NOTIFY THE COURT at(five days before your hearing, if possible). In all criminal cases and in some other proceedings, the court will arrange for the interpreter and will pay the interpreter's fees. You must use an interpreter from the list provided by the court.

In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including auxiliary communicative aids and services) during this proceeding should call Julie Kroff at 435-843-4713 at least three working days prior to the proceeding.

Third District Court
Tooele County Courthouse
47 South Main
Tooele, Utah 84074

Address Service Requested

TOOELE FEB 28'03 UT PB METER 7090639

Clifton Panos
996 Oak Hills Way

Exhibit "G"

Fax Transmission (No. of pages: 7)

DISTRICT COURT - TOOE
2003 MAR 17 AM 9:18

To: The Hon. Randall N. Skanchy Third District Court, Tooele County
47 S. Main Street, Room 321, Tooele, UT 84074-2131 **Case no.:** 038300082 ST
Fax no.: (435) 843-3210 **Telephone:** (435) 882-8524 **Date:** March 15th, 2001
FILED BY

From: Clifton W. Panos, 996 Oak Hills Way, Salt Lake City, Utah 84108-2022
Tele: (801) 582-0645 **E-mail:** clifpanos@yahoo.com

Judicial Administration Rule 4-501 Does *Not* Apply to Small Claims

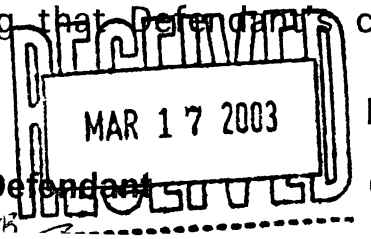
Code of Judicial Administration 4-803(H) specifically enjoins: *"The trial de novo* [and any pretrial proceedings pertaining to it] *shall be tried in accordance with the procedures of small claims actions."*

Your Honor:

Respecting the above-referenced case, *today via mail I received from opposing counsel a Notice to Submit for Decision* (copy appended hereto). This seems to indicate a reliance upon Judicial Administration Rule 4-501, which does not apply in this matter. (Refer to provision of said rule indicated with circling in copy thereof hereafter annexed.) It was for this reason that I did not file a Notice to Submit for Decision with the Court myself, nor file a written request for a hearing with my principal memorandum in support of Plaintiff's Motion to Dismiss Appeal.

However, since adverse counsel has invoked the Court per C.J.A. 4-501, I, while not constrained per se by such, to some extent follow its precepts by herewith petitioning the Court for a hearing on the motion at this time. Also, I did not file a reply memorandum to Defendant's memorandum in opposition because my construing of Rule 6 of Small Claims Procedure was that I could make such a reply orally at the time of trial. If I was incorrect in this assessment, I would ask the Court to accept this communication as a motion to enlarge the time for filing said reply pursuant to Rule 6(b) of Civil Procedure.

Finally, Judicial Administration Rule 4-501(3)(G)'s provision ***"All dispositive motions shall be heard at least thirty (30) days before the scheduled trial date"*** does not comport with Small Claims Rule 6(b)'s directive ***"No motions will be heard prior to trial".*** However, if a pretrial hearing on Plaintiff's Motion to Dismiss Appeal can be stipulated to, I so do, trusting that Defendant's counsel and the Court itself are similarly amenable.



Most respectfully,
Clifton W Panos
Clifton W. Panos

copy to: Richard N. Barnes, counsel for Defendant

Exhibit "H"

In re ZELLA M. **HERREN,** Debtor.

Case No. 91-01044-A CHAPTER 7

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF WYOMING

138 B.R. 989; 1992 Bankr. LEXIS 548; 22 Bankr. Ct. Dec. 1334

April 8, 1992, Decided
April 9, 1992, Filed and Entered

JUDGES: [**1] Mai

OPINIONBY: BY THE COURT; HAROLD L. MAI

OPINION: [*990] FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER came before the court on March 11, 1992, for hearing on the United States Trustee's Objection to Fee paid to an entity called Wyoming Document Center. Paul Hunter appeared for the United States Trustee and Larry T. Ralls, Sr., appeared on behalf of the Wyoming Document Center.

The court having considered the Motion, the statements and arguments of counsel and of Mr. Ralls, the exhibits, and being fully advised upon its own review of the applicable statutes and authorities, does hereby find and conclude as follows:

FINDINGS OF FACT

1. Wyoming Document Center is a business located in Lander, Wyoming. Mr. Larry T. Ralls, Sr., is the President and General Manager of the business. At the bottom of the Document Center's stationery is the following statement: "Owned and Operated by Big Sky Investments, Inc. - Lander, Wyoming."

2. Mr. Ralls is not an attorney and is not licenced to practice law in the State of Wyoming.

3. The business of the Document Center is to prepare legal documents. In order to obtain clients, it advertises its services.

[*991] 4. The Document Center provides potential clients with a document [**2] entitled "YOUR RIGHTS AS A CITIZEN." This document advises the client as follows:

* * * A highly paid army of persuaders surround us with thousands of seductive messages each day that all say "buy, buy, buy". Credit that is readily available makes living beyond our means tempting as well as being difficult to resist the siren sounds of the advertiser. We are also told that if we fail to pay for it right on time, we are miserable deadbeats. * * *

God forsake, if for some just reason, such as illness, loss of work, a bad marriage, or just plain bad planning, our ability to pay for the goods or services we need is interrupted. If this should happen our first feelings are fear and guilt. We may even feel that we have fundamentally failed as human beings.

Nonsense, there is more to life than an A+ credit rating and lots of better things to feel guilty about than the

dvising of available exemptions from which to chose, defining terms in the schedules, directing what roperty is appropriately listed in various areas, summarizing and reformulating the information solicited om clients, advising clients regarding responsibility to list all debts and the option of voluntary repayment nd similar actions, all require exercise of legal judgment beyond the capacity [**16] and knowledge of lay ersons. *In re Anderson,* 79 Bankr. 482, 485 (Bankr S.D. Cal. 1987); *O'Connell v. David,* 35 Bankr. at 144; *Bachmann,* 113 Bankr. at 772-3.

urther, the court finds and concludes that the Document Center's exhortation to "please don't delay . . . our debt problem will *not* go away . . unless you act NOW", is itself giving legal advice. The unmistakable ind ordinary meaning of the "Dear future prospect letter" is (1) to advise that bankruptcy filing should not be delayed and (2) a representation that the client will thereby be rendered *"absolutely debt-free,* except for normal living expenses."

Such advice about the timing of an anticipated bankruptcy filing is a matter which requires legal expertise, since from that date flows numerous consequences including the dischargeability of certain debts such as student loans and taxes, entitlement to discharge, recoverability of preferences, and maximization of exemptions.

Similarly, while the written materials offer the advice, indeed the promise, that by filing proper documents the client will become "absolutely" debt-free, this legal advice about the consequences [**17] of filing is not tempered with the unfortunate truth that many financial troubles arise from non-dischargeable debts.

Further, read as a whole, and in the context of inclusion in the packet of forms, the "Routine Bankruptcy Procedure" document appears to advise the client what he or she can expect in their specific case and not just provide general information regarding bankruptcy law. n2 It appears to assure the client that he or she can expect a total "fresh start" and the case closed within three (3) to six (6) months. This completely ignores the possibility of litigation over the dischargeability of debts or other frequent complications.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 *E.g.,* It does not inform the clients that 341 Meetings are frequently continued to another date in which case the debtor will again be required to appear. See Fed. R. Bankr. P. 2003(e).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Section 329(b) applies to all persons who render legal services to the debtor in connection with, or contemplation of bankruptcy, including lay 'persons as well as lawyers. *In re Grimes,* 115 Bankr. 639, 649-50 (Bankr. D. S.D. 1990); [**18] *Bachmann,* 113 Bankr at 775; *In re Glad,* 98 Bankr. 976, 978 (9th Cir. BAP 1989) (solicitation of financial information used to prepare petition and schedules was "legal services" rendered by nonattorney), *In re Fleet,* 95 Bankr. 319, 338 [*996] (E.D. Pa. 1989) ("§ 329 provides court with alternative, plenary authority to regulate, enjoin, and impose monetary sanctions against lay persons as attorneys who bilk debtors in our court."); *In re Telford,* 36 Bankr. 92, 94 (9th Cir. BAP 1984).

The execution of a contract classifying or categorizing the services rendered as "legal scrivener," "legal technician," or some similar term, does not insulate the provider from liability under § 329 if, in fact, the services are legal services. See *In re Anderson,* 79 Bankr. 482 (Bankr. S.D. Cal. 1987). similarly, a contract stating that the client understands that the services are not legal advice and are not provided by attorneys, does not insulate a lay person who engages in the actual unauthorized practice of law *Id*

The actual typing involved in this case is minimal. In all cases in which a competent typist merely [**19] transcribes information filled out on official forms by the client, the time involved would be brief. If extra time by a nonattorney is spent correcting, summarizing, or reformulating information provided by a client, that time is spent on the unauthorized practice of law *Bachmann,* 113 Bankr at 774 Such time spent in the unauthorized practice of law does not benefit a client.

Any business "overhead" for advertising that constitutes solicitation for the unauthorized practice of law is similarly not a service which benefits a "pro se" debtor

In conclusion, it is clear that the respondent has engaged in the unauthorized practice of law. As such, it is

24. Mr. Ralls specifically denies that he gave Ms. **Herren** legal advice. He does admit that she informed him of her prior filing, but asserts that he didn't advise her regarding the second filing

25. Mr. Ralls represents that the Document Center's expenses for advertising, office overhead, and paperwork, result in a profit of $ 40 out of each $ 300 fee.

26. After Ms. **Herren** filed her second Chapter 7 petition, Mr. Ralls sent letters to both the Office of the United States Trustee and to Ms. **Herren's** Chapter 7 trustee asserting that he did not represent her and never had.

CONCLUSIONS OF LAW

This court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157. This Objection to Fee is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A) and (O).

Despite the vehement disclaimers and the repetitive initialing of the fee contract provisions, the exhibits unquestionably establish that the Wyoming Document Center and its manager Big Sky Investments, Inc., are engaged in the unauthorized practice of law.

It is an unauthorized practice of law to prepare legal instruments by which legal rights are secured. See *State ex rel Wyoming State Bar v. Hardy*, 156 P.2d 309, 61 Wyo. 172 (Wyo. 1945). [**13] A bankruptcy petition, and the accompanying Statement of Affairs and Schedules, including the schedule of property claimed as exempt, are indisputably legal instruments by which legal rights are secured.

Providing copies of the Official Forms necessary to filing a petition for bankruptcy relief is a legitimate and necessary service to the public. Similarly, a typing service that consists of solely transcribing written information furnished by clients is a service that may be legitimately provided by non-attorneys. *In re Bachmann,* 113 Bankr. 769, 774 (Bankr. S.D. Fla. 1990). Even the "sale of printed material purporting to explain bankruptcy practice and procedure to the public" is permissible. *Id.*

Nonetheless, the respondent's conduct has far exceeded these acceptable practices. By its Definitions of Schedules, and attached Blue Sheet, respondent has impermissibly provided specific direction as to the correct way to fill out the forms, including what property to list where. "[Typing services] may not make inquiries nor answer questions as to the completion of particular bankruptcy forms nor schedules nor answer questions as to the completion of particular [**14] bankruptcy forms or schedules nor advise how to best fill out bankruptcy forms or schedules " *Id.*

"Actual preparation and direct or indirect filing for the debtor of Chapter 7 and Chapter 13 petitions, statements, schedules and Chapter 13 Plans" constitutes the unauthorized practice of law. *O'Connell v. David,* 35 Bankr. 141, 143 (Bankr. E.D. Pa. 1983) modified 35 Bankr. 146 (E.D. Pa 1983) aff'd 740 F.2d 958 (3rd Cir. 1984).

The solicitation of financial information and preparation of schedules is rendering legal advice, whether provided by lay persons or lawyers. *In re Grimes,* 115 Bankr. 639, 643 (Bankr. D. S.D. 1990).

In connection with preparing legal documents such as the schedules, providing [*995] clients with definitions of such legal terms of art as "creditors holding secured claims," "real property," "executory contracts," and the like is, by itself, giving legal advice.

Under the circumstances of this case, directing the client to "refer" to what appears to be a comprehensive list of Wyoming exemptions from which the client is to select assets is, by itself, the unauthorized practice of law. The only fair interpretation [**15] of the referral to the provided list is that one Document Center is advising the client of its opinion regarding available exemptions in Wyoming. It makes no difference whether the Document Center's proffered legal advice was correct (occupancy necessary for homestead) or incorrect (omission of retirement and vehicle exemption). Either way, it is still legal advice, complete with statutory references.

The exhibits in this case establish that the Document Center solicited business on the basis that it had a special expertise beyond that of a lay person ("it has to be done to perfection . . . it has to be immaculate before a federal court will accept it we feel you do need professional help . We will not leave your side in preparing the current documents which are required by law.").

Exhibit "I"

In re: CHRISTINE KAITANGIAN, Debtor, Case No. 96-01692-B7; DIXIE R. HENRY, Debtor, Case No. 96-06354-M7; CORRIE RUTH BAKER, Debtor, Case No. 96-07367-H7; CAROLYN A. CAMERA, Debtor, Case No. 96-09272-A7; SCOTT T. HANSEN and THERESA M. HANSEN, Debtors, Case No. 96-08789-M7; CHRISTINA M. MCMARTIN, Debtor, Case No. 96-08788-A7; TILLIE SANCHEZ, Debtor, Case No. 96-07639-A7

Case No. 96-01692-B7, Case No. 96-06354-M7, Case No. 96-07367-H7, Case No. 96-09272-A7, Case No. 96-08789-M7, Case No. 96-08788-A7, Case No. 96-07639-A7

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

218 B.R. 102; 1998 Bankr. LEXIS 136; 39 Collier Bankr. Cas. 2d (MB) 860

January 23, 1998, Decided
January 23, 1998, Filed

COUNSEL: [**1] Christine Kaitangian, Debtor, Pro se, San Anselmo, CA.

Dixie R. Henry, Debtor, Pro se, Oceanside, CA.

Corrie Ruth Baker, Debtor, Pro se, Oceanside, CA.

Carolyn A. Camera, Debtor, Pro se, Vista, CA.

Scott T. & Theresa M. Hansen, Debtors, Pro se, Oceanside, CA.

Christina M. McMartin, Debtor, Pro se, Oceanside, CA.

Tillie Sanchez, Debtor, Pro se, Oceanside, CA.

Trustee for Debtor Camera: Harold Taxel, Esq., La Jolla, CA.

Trustee for Debtor Sanchez: Gerald Davis, Esq., Coronado, CA.

Trustee for Debtors McMartin & The Hansens: Gregory Akers, Esq., San Diego, CA.

Trustee for Debtors Kaitangian, Henry & Baker: Ralph O. Boldt, Esq., San Diego, CA.

Ronald V. Filippone, Respondent, Pro se, Oceanside, CA.

Ronald V. Filippone, II, Respondent, Pro se, Oceanside, CA.

Office of the United States Trustee: David A. Ortiz, Attorney, San Diego, CA.

JUDGES: JOHN J. HARGROVE, United States Bankruptcy Judge.

OPINIONBY: JOHN J. HARGROVE

OPINION: [*105] MEMORANDUM DECISION

·gal knowledge, training, skill, and ability beyond those possessed by the average layman." Id. at 547. ccordingly, the Court finds that the Filippones' advice and explanations regarding differences between hapter 7 and Chapter 13 of the Code constitutes the unauthorized practice of law.

*111] *C. ADVICE REGARDING REAFFIRMATION OF DEBTS.*

lcMartin testified that Filippone explained to her the concept of "reaffirmation" of debts in reference to her ar. Specifically, McMartin testified:

> During my meeting [**21] with Mr. Filippone, he looked over the questionnaires and asked what I wanted to do about the car. I told him I wanted to keep the car. He then told me that I could re-affirm the debt and keep the car. I did not know what re-affirming a debt meant. So he explained it to me.

ilippone then prepared the "Statement of Intention" for McMartin reaffirming her automobile debt.

aker testified that during the course of her meeting with Filippone II, she told him that she wanted to keep er van. She testified that Filippone II said that she could do that, but that she would have to reaffirm the ebt and keep making the payments. Baker further testified that although she understood she had to reaffirm ne debt to keep her van, she was not familiar with which Bankruptcy Code section dealt with reaffirmation or did she tell Filippone to use a Bankruptcy Code section on the Statement of Intention. On redirect xamination, Baker testified that she did not know what § 524 meant. Baker's Statement of Intention states:

Description of Property	**Creditor's Name**	**Intention**
995 Toyota Previa LE/SC	Toyota Motor Credit Corp	Reaffirm 524(c)*

524(c)· Debt will be reaffirmed pursuant to Sec. 524(c).

**22]

lthough there is no direct testimony on point, the Court finds that when Baker signed her bankruptcy leadings, including the Statement of Intention, the language regarding § 524 had been typed in by Filippone I, or by employees of USPS who had been instructed to do so by Filippone II.

inally, Hansen testified that after she had signed her bankruptcy pleadings and upon further review of the onformed copies of the bankruptcy pleadings, she noticed a document entitled "Chapter 7 Debtor's tatement of Intention" which appeared to state that she and her husband had "reaffirmed" certain debts. he further testified that she had never been advised about "reaffirmation" by Filippone II, did not know what meant, and had not prepared the "Statement of Intention."

n connection with preparing legal documents, such as the Statement of Intention, providing clients with xplanations or definitions of such legal terms of art such as "reaffirmation" is, by itself, giving legal advice. ee Herren, 138 B.R at 995 (providing clients with definitions of legal terms of art is giving legal advice). ccordingly, the Court finds that the Filippones and USPS have engaged in the unauthorized [**23] practice f law by explaining to debtors the legal term "reaffirmation" as the term is used in § 524(c).

. ADVICE REGARDING THE TIMING OF FILING CHAPTER 7 PETITIONS.

lansen testified that she met with Filippone II and discussed the timing for filing her Chapter 7 petition. lansen testified that she asked Filippone II whether it would be better to file a marital separation before or fter the bankruptcy proceedings and that he told her that she should file bankruptcy first. The testimony is inrebutted. The evidence also reflects that Hansen followed Filippone II's advice and allowed USPS to file the ankruptcy prior to her marital separation petition

t is clear that Hansen not only sought Filippone II's advice, but relied on it as well. One court noted "such dvice about the timing of an anticipated bankruptcy filing is a matter which requires legal expertise, since rom that date flows numerous consequences [*112] including the dischargeability of certain debts such as tudent loans and taxes, entitlement to discharge, recoverability of preferences, and maximization of xemptions." Herren, 138 B.R. at 995. Furthermore, the interplay between the bankruptcy laws and the narital [**24] dissolution laws complicates these issues. Accordingly, the Court finds that Filippone II ngaged in the unauthorized practice of law by giving advice to Hansen regarding whether she should file for

bankruptcy prior to filing for separation.

E. CLASSIFICATION OF DEBT.

McMartin testified that she did not know whether a debt on a house which she had previously owned with her husband should be listed on her bankruptcy papers. She testified that as part of a divorce decree the house was quitclaimed to her husband. McMartin testified that Filippone advised her "that by including the debt on the house in my bankruptcy, I could 'sever my ties' with the house." McMartin also testified that prior to meeting with Filippone she did not know what an unsecured debt was and where these debts should be listed on her bankruptcy papers. She testified that Filippone "did that for me as well." Giving advice about whether a debt is secured or unsecured requires legal expertise. In re Harris, 152 B.R. 440, 445 (Bankr. W.D. Pa. 1993). Accordingly, the Court finds that Filippone's advice and recommendations to McMartin on how to classify her debt constitute the unauthorized practice of law. [**25]

F. ADVICE REGARDING DISCHARGEABILITY OF STUDENT LOANS.

Baker testified that she discussed her student loan with Filippone and that he told her he did not believe it would be discharged in her bankruptcy. The Court finds that advising debtors on dischargeability issues constitutes the unauthorized practice of the law. Arthur, 15 B.R. at 547.

The above incidents were not isolated events. A course of conduct involving the unauthorized practice of law by the Filippones was corroborated by Guyer. Guyer testified that as part of her agreement with Filippone, she was provided with copies of a "customer questionnaire" to be used in the preparation of bankruptcy cases. She testified that the questionnaire was not simply a blank copy of the bankruptcy petition, schedules, Statement of Financial Affairs, and Statement of Intention. The questionnaire did not ask the debtors for information necessary to fill out Schedule C (Exemptions), Schedule D (Secured Creditors), Schedule E (Priority Creditors), Schedule F (Unsecured Creditors), Schedule G (Executory Contracts and Unexpired Leases), or Schedule H (Co-Debtors). In addition, the questionnaire's "Financial Affairs" section did [**26] not contain all the questions found in the official form "Statement of Financial Affairs."

Guyer further testified that her training included sitting in on debtor interviews with the Filippones. She observed the Filippones solicit information from the debtors that was not included in the questionnaire. She testified that Filippone would ask debtors whether they wanted to keep a credit card account and/or the property purchased with a credit card or surrender the property. This information was then used to prepare the "Statement of Intention." Guyer testified that during her training period, she also observed the Filippones explain to prospective debtors the difference between Chapter 7 and Chapter 13 The Court has previously discussed Guyer's testimony regarding the Filippones' process of selecting exemptions for debtors.

Although the Filippones deny that they ever practiced law and testified about disclaimers given both orally and in writing, the evidence contradicts these assertions. The Filippones had personal contact with the debtors during which the Filippones explained forms, procedures and terms such as "reaffirmation," selected exemptions, advised debtors on whether to file [**27] a Chapter 7 or Chapter 13, and advised debtors on the timing of their anticipated bankruptcy. The personal contact coupled with the explanations and advice rise to a relationship of trust between the parties that is tantamount to that of an attorney-client. The Filippones analyzed the factual information received on the debtors' questionnaires and from personal interviews. The Filippones then exercised legal judgment in making various decisions for the debtors as set forth above. Given the [*113] extent of the personal contact, advice and counseling, it is apparent that a relationship of trust and confidence developed between the parties with the debtors trusting that the Filippones would prepare their bankruptcy petitions and related pleadings correctly. See Landlords' Professional Services, 215 Cal. App 3d at 1599 (court found personal contact was a key factor in finding defendant engaged in the unauthorized practice of law). n13

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n13 The court in Landlords Professional Services reviewed similar cases in other jurisdictions. For example, in Oregon State Bar v. Gilchrist, 272 Ore. 552, 538 P 2d 913 (1975) the court concluded that it was not an unauthorized practice of law to advertise and sell divorce kits so long as the service had no personal contact with a client. In New York Lawyers' Assn. v. Dacey, 21 N.Y.2d 694, 234 N.E.2d 459, 287 N.Y.S.2d 422 (1967), the court found sale of Norman F. Dacey's book "How To Avoid Probate" was not an unauthorized practice of law since there was no personal contact or relationship with any particular individual so that there was no relationship of competence and trust established which is so necessary to the status of attorney and

aron v. City of Los Angeles, 2 Cal. 3d 535, 541-42, 86 Cal. Rptr. 673, 469 P.2d 353 (1970).

deciding whether an eviction service was engaged in the unauthorized practice of law, the appellate court People v. Landlords Professional Services, 215 Cal. App. 3d 1599, 1608, 264 Cal. Rptr. 548 (4th Dist.)89) found:

> That such services do not amount to the practice of law as long as the service offered by [Landlords Professional Service] was merely clerical, i.e., the service did not engage in the practice of law if it made forms available for the client's use, filled the form in at the specific direction of the client and filed and served those forms as directed by the client. Likewise, merely giving a client a manual, even [**15] a detailed one containing specific advice, for the preparation of an unlawful detainer action and the legal incidence of an eviction would not be the practice of law if the service did not personally advise the client with regard to a specific case.

ıe court further commented:

> The advertisement used by LPS implies its eviction services were not limited to clerical functions. The tenor of the advertisement was that the service accomplished evictions. The advertisements' statement "Call & talk to us" was a general invitation for clients to discuss the matter of eviction with LPS. Bill Watts' LPS business card listed his title as "Counselor." In short, LPS cast about itself an aura of expertise concerning evictions.

ɪ. at 1608.

ıe UST contends that the Filippones provided the following services: (1) giving advice and selecting .emptions for debtors; (2) giving advice regarding the selection of the appropriate bankruptcy Chapters; (3) ving advice regarding reaffirmation of debts; (4) giving advice regarding the timing of filing bankruptcy; (5) ving advice regarding the classification of debt; and (6) giving advice regarding the dischargeability of udent [**16] loans For the reasons set forth below, the Court finds that the various services which the ippones performed constitute the unauthorized practice of law.

CALIFORNIA EXEMPTION LAW.

ıker, Camera, Hansen, n10 McMartin, Kaitangian and Sanchez testified that they had no prior knowledge of ılifornia exemption law nor did they instruct the Filippones which California exemption they wished to lect. n11 The debtors also testified that they were not provided with any written information describing .emptions available under bankruptcy law in California by anyone at USPS. The debtors testified that after ling out a questionnaire supplied by USPS, they would receive a telephone call to return to the USPS office sign their bankruptcy pleadings which were to be filed with the bankruptcy court. n12 When the debtors turned to sign the pleadings, a specific California exemption was claimed on their Schedule C. In other ɔrds, the Filippones chose the exemptions for the debtors.

- - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

l0 Although Scott and Theresa Hansen filed a joint petition, only Theresa Hansen testified in this oceeding. Therefore, all references herein to Hansen are to Theresa Hansen [**17]

l1 California offers two sets of exemptions. California Code of Civil Procedure ("CCP") § 704 and CCP §)3.140 The latter is commonly known as the California "federal" exemption and incorporates, for the most ırt, the exemptions offered debtors under § 522(d)

Exhibit "J"

In re LANDRY, PAMELA KAYE, Debtor. In re PEARSON, ANNETTA NORINE, PEARSON, JAMES KEITH, Debtors. LEIGH R. MEININGER, Trustee, Plaintiff, vs. STACEY BURNWORTH, PARALEGAL PAPERWORKS, INC., Defendants.

Case No. 99-09643-6J7, Case No. 99-01125-6J7, Adversary No. 99-00174

UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION

268 B.R. 301; 2001 Bankr. LEXIS 1360; 46 Collier Bankr. Cas. 2d (MB) 1657; 14 Fla. L. Weekly Fed. B 402

September 14, 2001, Decided

PRIOR HISTORY: In re Landry, 250 B.R. 441, 2000 Bankr. LEXIS 732 (Bankr. M.D. Fla. 2000)

DISPOSITION: [**1] Guidelines were established for determination of reasonable fees of a bankruptcy petition preparer.

COUNSEL: UNITED STATES TRUSTEE: ORLANDO, FL.

Chapter 7 Trustee: KENNETH D. HERRON, JR., ORLANDO, FL.

Chapter 7 Trustee: LEIGH R. MEININGER, ORLANDO, FL.

For Defendant: VINETTE MORRIS HUDSON, ORLANDO, FL.

JUDGES: Karen S. Jennemann, United States Bankruptcy Judge.

OPINIONBY: Karen S. Jennemann

OPINION: [*303]

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE DETERMINATION OF REASONABLE FEES OF BANKRUPTCY PETITION PREPARER

On June 5, 2001, the Court heard evidence on what constitutes a reasonable fee [*304] to pay a bankruptcy petition preparer for preparing bankruptcy pleadings in a consumer Chapter 7 bankruptcy case and to establish guidelines for the determination of reasonable fees for similar cases in the future. These combined cases involve one bankruptcy petition preparer, Stacey Burnworth, and her company, Paralegal Paperworks, Inc. ("Paperworks"). Paperworks prepares bankruptcy [**2] petitions and related pleadings for prospective debtors, including the debtors in these cases, Ms. Landry and Mr. and Mrs. Pearson.

The Court previously ruled that Ms. Burnworth was entitled to a fee of $ 50 for her services on behalf of the debtors. Ms. Burnworth appealed this decision, among others, and the United States District Court for the Middle District of Florida remanded both cases "for an independent finding of what constitutes an appropriate fee for services rendered by Appellant [Burnworth and Paperworks] based on current evidence both for and against any such award of fee, and for the establishment of guidelines which will assist the Bankruptcy Court in the future in carrying out its responsibility under Section 110 [of the Bankruptcy Code] to disallow unreasonable fees." (Adv. No. 99-00174, Doc. No. 49).

lying to a large extent on the analysis of the District Court, this Court recognizes that in 1994, the nkruptcy Code was amended, in part, to recognize and to regulate the role of a bankruptcy petition eparer. A petition preparer is defined as "a person, other than an attorney, who prepares for compensation document for filing." 11 U.S.C. § 110 [**3] (a)(1). Section 110(h)(1) of the Bankruptcy Code n1 further ovides that the bankruptcy court is required to disallow any bankruptcy petition preparer's fee found to be excess of the value of services rendered for the documents prepared." 11 U.S.C. § 110(h)(2).

- - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

Unless otherwise stated, all references to the Bankruptcy Code refer to Title 11 of the United States Code.

- - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

e type of compensable services that a bankruptcy petition preparer can render are extremely limited. tition preparers, who by definition are not attorneys, cannot give legal advice or otherwise engage in the authorized practice of law. In re Guttierez, 248 B.R. 287, 296, n.25 (Bankr. W.D. Tex. 2000) (See cases ed therein). Clearly, as recognized by the District Court, a bankruptcy petition preparer cannot assist the btor in completing forms, provide legal advice that would assist a prospective debtor in making terminations as to which type of bankruptcy to file or which exemptions [**4] to take, or direct clients to rticular legal publications or specific pages so that they can attempt to find legal answers on their own. The ry act of directing a prospective debtor to review a particular section of a legal book in and of itself nstitutes legal advice. By focusing on one answer and excluding others, the bankruptcy petition preparer ips over the line. As stated by the District Court, "Legal advice is legal advice, whether it comes directly m the petition preparer or indirectly via, for example, a bankruptcy treatise being recited by that preparer. rsons seeking legal assistance tend to place their trust in an individual purporting to have expertise in that ea." Florida Bar v. Brumbaugh, 355 So. 2d 1186 (Fla. 1978).

erefore, a bankruptcy petition preparer can expect to receive compensation only for secretarial-type rvices. As stated by the United States for the Western District of Texas in Guttierez:

> [*305]
>
> So what does § 110 tacitly permit? The answer in a nutshell is "not much." Section 110 itself proscribes virtually all conduct falling into the category of guidance or advice, effectively restricting "petition preparers" to [**5] rendering only "scrivening/typing" services. Anything else-- be it suggesting bankruptcy as an available remedy for a debtor's financial problems, merely explaining how to fill out the schedules, or answering questions about exemptions or whether a claim is or is not secured will invariably contravene either state laws proscribing the unauthorized practice of law or other more specific provisions of § 110. The only service that a bankruptcy petition preparer can safely offer and complete on behalf of a pro se debtor after the enactment of § 110 is the "transcription" of dictated or handwritten notes prepared by the debtor prior to the debtor having sought out the petition preparer's service. Any other service provided on behalf of the debtor by a non-attorney (even telling the debtor where the information goes on the form) is not permitted under state unauthorized practice of law statutes, and so is also not authorized by § 110.

uttierez, 248 B.R. at 297-98. Thus, under § 110, the services a bankruptcy petition preparer can provide e extremely limited.

bankruptcy petition preparer can meet a prospective debtor, provide forms or questionnaires [**6] for the btor to complete without any assistance from the bankruptcy petition preparer, transcribe the information pplied by the prospective debtor on the applicable bankruptcy forms without change, correction, or eration, copy the pleadings, and gather all necessary related pleadings to file with the bankruptcy court. e bankruptcy petition preparer cannot improve upon the prospective debtor's answers, cannot counsel the ent on options, and cannot otherwise provide legal assistance to the prospective debtor, directly or directly. However, to the extent the bankruptcy petition preparer provides the limited secretarial-type rvices, the preparer is entitled to receive reasonable compensation.

Exhibit “K”

THE FLORIDA BAR, Petitioner, v. MARILYN R. BRUMBAUGH, Respondent

No. 48,803

Supreme Court of Florida

355 So. 2d 1186; 1978 Fla. LEXIS 4657

January 10, 1978

COUNSEL: [**1]

R. Layton Mank, Chairman, Standing Unauthorized Practice of Law Committee, Miami, Florida; Richard C. McFarlain, Assistant Director- Legal, Tallahassee, Florida; Young Joe Simmons, Counsel, Ocala, Florida; and William B. Wiley and John A. Weiss, Assistants Staff Counsels, Tallahassee, Florida, for The Florida Bar, Petitioner.

Marilyn R. Brumbaugh, in proper person, for Respondent.

JUDGES: Overton, C.J., Adkins, Boyd and Hatchett, JJ., concur. Karl, J., concurs specially with an opinion, with which Overton, C.J., Adkins and Boyd, JJ., concur.

OPINIONBY: PER CURIAM

OPINION: [*1189] The Florida Bar has filed a petition charging Marilyn Brumbaugh with engaging in the unauthorized practice of law, and seeking a permanent injunction prohibiting her from further engaging in these allegedly unlawful acts. We have jurisdiction under our constitutional authority to adopt rules for the practice and procedure in all the courts of this state. Article V, Section 2(a), Florida Constitution (1968). We now issue an injunction, delineating in this opinion those acts of respondent which we deem to constitute the unauthorized practice of law, and ordering her to stop such activities.

Respondent, Marilyn [**2] Brumbaugh, is not and has never been a member of the Florida Bar, and is, therefore, not licensed to practice law within this state. She has advertised in various local newspapers as "Marilyn's Secretarial Service" offering to perform typing services for "Do-It-Yourself" divorces, wills, resumes, and bankruptcies. The Florida Bar charges that she performed unauthorized legal services by preparing for her customers those legal documents necessary in an uncontested dissolution of marriage proceeding and by advising her customers as to the costs involved and the procedures which should be followed in order to obtain a dissolution of marriage. For this service, Ms. Brumbaugh charges a fee of $50.

Of course, we must determine whether the Florida Bar has presented sufficient evidence in the record before us to prove that respondent has engaged in the unauthorized practice of law. But, in cases such as this, the Florida Supreme Court is not confined to act solely in its judicial capacity. In addition, it acts in its administrative capacity as chief policy maker, regulating the administration of the court system and supervising all persons who are engaged in rendering legal advice to [**3] members of the general public. Such authority carries with it the responsibility to perform this task in a way responsive to the needs and desires of our citizens. This principle has long been our goal. In *State v. Sperry*, 140 So.2d 587, 595 (Fla. 1962), we noted:

> The reason for prohibiting the practice of law by those who have not been examined and found

elieved that she was an attorney, or that she was acting as an attorney in their behalf. Respondent's dvertisements clearly addressed themselves to people who wish to do their own divorces. These customers new that they had to have "some [**8] type of papers" to [*1191] file in order to obtain their dissolution marriage. Respondent never handled contested divorces. During the past two years respondent has ssisted several hundred customers in obtaining their own divorces. The record shows that while some of her ustomers told respondent exactly what they wanted, generally respondent would ask her customers for the ecessary information needed to fill out the divorce papers, such as the names and addresses of the parties, ie place and duration of residency in this state, whether there was any property settlement to be resolved, any determination as to custody and support of children. Finally, each petition contained the bare legation that the marriage was irretrievably broken. Respondent would then inform the parties as to which ocuments needed to be signed, by whom, how many copies of each paper should be filed, where and when ey should be filed, the costs involved, and what witness testimony is necessary at the court hearing. pparently, Ms. Brumbaugh no longer informs the parties verbally as to the proper procedures for the filing of ie papers, but offers to let them copy papers described as "suggested [**9] procedural education."

ie Florida Bar argues that the above activities of respondent violate the rulings of this Court in *The Florida ar v. American Legal and Business Forms, Inc.*, 274 So.2d 225 (Fla. 1973), and *The Florida Bar v. Stupica*, 00 So.2d 683 (Fla. 1974). In those decisions we held that it is lawful to sell to the public printed legal forms, ovided they do not carry with them what purports to be instructions on how to fill out such forms or how to se them. We stated that legal advice is inextricably involved in the filling out and advice as to how to use ich legal forms, and therein lies the danger of injury or damage to the public if not properly performed in ccordance with law. In *Stupica*, supra, this Court rejected the rationale of the New York courts in *New York ounty Lawyers' Association v. Dacey*, 28 A.D.2d 161, 283 N.Y.S.2d 984, reversed and dissenting opinion dopted 21 N.Y.2d 694, 287 N.Y.S.2d 422, 234 N.E.2d 459 (N.Y. 1967), which held that the publication of rms and instructions on their use does not constitute the unauthorized practice of law if these instructions e addressed to the public in general rather than to a specific individual [**10] legal problem. The Court in *acey* stated that the possibility that the principles or rules set forth in the text may be accepted by a articular reader as solution to his problem, does not mean that the publisher is practicing law. Other states ave adopted the principle of law set forth in *Dacey*, holding that the sale of legal forms with instructions for eir use does not constitute unauthorized practice of law. See *State Bar of Michigan v. Cramer*, 399 Mich. 16, 249 N.W 2d 1 (1976); *Oregon State Bar v. Gilchrist*, 272 Or 552, 538 P.2d 913 (1975). However, these ourts have prohibited all personal contact between the service providing such forms and the customer, in ie nature of consultation, explanation, recommendation, advice, or other assistance in selecting particular rms, in filling out any part of the forms, suggesting or advising how the forms should be used in solving the articular problems.

lthough persons not licensed as attorneys are prohibited from practicing law within this state, it is somewhat ifficult to define exactly what constitutes the practice of law in all instances. This Court has previously stated iat.

> . . . if the giving [**11] of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.

perry, supra, 140 So.2d at 591

his definition is broad and is given content by this Court only as it applies to specific circumstances of each ase. We agree that "any attempt to formulate a [*1192] lasting, all encompassing definition of 'practice of iw' is doomed to failure 'for the reason that under our system of jurisprudence such practice must ecessarily change with the ever-changing business and social order.'" *State Bar of Michigan v. Cramer*, upra, 249 N.W.2d at 7.

n determining whether a particular act constitutes the practice of law, our primary goal is the protection of ie public However, any limitations on the free practice of law by all persons necessarily affects nportant [**12] constitutional rights. Our decision here certainly affects the constitutional rights of Marilyn

Exhibit "L"

together with the words "Paid in Full" written on the account, is sufficient to prevent a finding of an amount due and owing, and, therefore, plaintiff has not carried the burden of proof. As previously discussed, it was unnecessary for plaintiff to produce the note because of defendant's judicial admission, and, therefore, no presumption of payment can be garnered from non-production of the note. Plaintiff's evidence set forth above was sufficient to overcome any inference of payment which was raised by the scratched out words, "Paid in Full," and we conclude the trial judge was correct in finding that plaintiff carried his burden of proof of the debt.

[3–5] Plaintiff claims by his cross-appeal that the trial court erred in failing to award attorney's fees in case of foreclosure as provided by the mortgage. We believe the question to be moot even if attorney's fees should have been allowed by the trial court because the record discloses that the mortgage was a purchase money mortgage. The property covered by the mortgage was sold to plaintiff on foreclosure during the pendency of this appeal for the amount of the trial court judgment. This judgment did not include an award for attorney's fees. There remain no secured assets with which to satisfy any judgment that might now be awarded for attorney's fees. When a personal judgment is entered against the mortgagor in the foreclosure of a purchase money mortgage, the excess over the amount realized from a sale of the mortgaged realty is void. Stretch v. Murphy, 166 Or. 439, 447, 112 P.2d 1018 (1941); ORS 88.070. In addition, upon redemption the defendant can be required to pay only the price paid for the property by the purchaser at foreclosure sale plus those other charges provided by ORS 88.080 and 23.560(2). Defendant could not be forced upon redemption to pay a judgment for attorney's fees awarded subsequent to sale on foreclosure.

The judgment of the trial court is af-

OREGON STATE BAR, a public corporation, Respondent,

v.

John W. GILCHRIST et al., Appellants.

Supreme Court of Oregon,
In Banc.
Argued and Submitted March 5, 1975.
Decided Aug. 7, 1975.

State Bar brought suit to enjoin defendants, who were not lawyers, from practicing law through advertising and sale of do-it-yourself divorce kits. The Circuit Court, Multnomah County, John C. Beatty, Jr., J., entered decree enjoining defendants' activities, and they appealed. The Supreme Court, McAllister, J., held that defendants did not engage in "practice of law" in merely publishing, advertising and selling such kits and thus they could not be enjoined from engaging in that part of their business, but that all personal contact between defendants and their customers in nature of consultation, explanation, recommendation or advice or other assistance with regard to certain matters constituted the "practice of law" and had to be strictly enjoined.

Decree modified, and as modified, affirmed.

1. Dismissal and Nonsuit ⇐46

Nonsuit may only be granted in actions at law.

2. Attorney and Client ⇐11(2)

Persons, who were not lawyers, did not engage in "practice of law," in merely publishing by advertising and selling do-it-yourself divorce kits, and thus they could not be enjoined from engaging in that part of their business.

See publication Words and Phrases for other judicial constructions and definitions.

3. Divorce ⇐146

Any person has unqualified right to

and to settle related issues of property rights, child custody, support and visitation without help of either an attorney or forms contained with a do-it-yourself divorce kit. ORS 9.320.

4. Attorney and Client ⚿11(2)

With regard to sale of do-it-yourself divorce kits by persons who were not attorneys, all personal contact between such persons and their customers in nature of consultation, explanation, recommendation or advice or other assistance in selecting particular forms, in filling out of any part of forms or in suggesting or advising how forms should be used in solving particular customer's marital problems constituted the "practice of law" and had to be strictly enjoined.

John Bassett, Milwaukie, argued the cause and filed a brief for appellants.

Barry P. Caplan, Portland, argued the cause for respondent. With him on the brief were Daniel C. Ellis, Garry L. Kahn and Gino G. Pieretti, Portland.

McALLISTER, Justice.

The plaintiff, Oregon State Bar, brought this suit to enjoin the defendants John W. Gilchrist, Robert J. Lavorato and Bev Coloma from practicing law through the advertising and sale of do-it-yourself divorce kits. Defendant Bev Coloma consented to the entry of a decree against her as prayed for in the complaint and is not a party to this appeal. from an adverse decree the defendants Gilchrist and Lavorato appeal.

The defendants John W. Gilchrist and Robert J. Lavorato, neither of whom are licensed to practice law, own and operate a business known as the Oregon Divorce Council. Their business consists of the sale of do-it-yourself divorce kits containing a manual for divorce, forms and instructions designed to enable an individual to complete and file the forms necessary to secure a dissolution of marriage.

The kit includes (a) a petition for dissolution of marriage; (b) a summons; (c) a marital settlement agreement; (d) an order of default; (e) an affidavit of non-military service; (f) a decree of dissolution of marriage; and (g) a manual for divorce which explains the forms and instructs the customer how to use them.

The manual uses as an illustration the hypothetical case of *Mary Jane Doe v. John Robert Doe.* A sample passage of the manual reads:

"MARY DOE PREPARES THE PETITION TO DISSOLVE THE MARRIAGE

"In their determination to proceed with as little cost as possible, John and Mary called the OREGON DIVORCE COUNCIL for information as to the functions of the Council in assisting people to obtain a divorce representing themselves.

"Securing an appointment, they met with the Council's Executive Director, Jack Gilchrist, at which time the couple was informed of the functions of the Council and what would transpire in their proceedings for a divorce.

"Director Gilchrist explained in depth the cost factors involved, what sequence of order the divorce action would follow in the court, and what was expected of each party. Moreover, John and Mary were instructed as to properly completing the 'Marital Settlement Agreement' and the need for such an agreement to simplify the divorce proceedings. The Director further explained the advantage of Mary being the petitioner and to that end, Jack agreed.

"After registering with the Council as a new member Mary was given a 'PORTFOLIO' that contained all of the procedural information necessary to obtain the divorce, plus all of the official court forms that would be needed.

"Taking the 'PORTFOLIO' home, Mary, with the help of John began preparing the petition and summons, the first forms to be filed with the court in order

married persons, determine child custody, support or visitation.

"5. Advertising by any means or media the availability for sale of forms, which advertisements expressly or impliedly represent that the forms which defendants have available for sale are sufficient to terminate a marriage, settle property rights between married persons, determine child custody, support or visitation.

"6. Suggesting contents of child custody, property settlement agreements entered into by the parties to a divorce or aiding said parties in wording a child custody or property settlement agreement or a decree incorporating a negotiation of child custody, support, visitation, or the property rights of the parties.

"7. Questioning prospective customers by form or otherwise in order to acquire information necessary to the drafting, filling out or choice of such forms, and

"8. Carrying on any activity which will aid and abet defendants in the violation of items 1 through 7 of this decree."

[1] The defendants assign as error the denial of their motion for an involuntary nonsuit. Since this is a suit in equity and a nonsuit may only be granted in actions at law, we need not concern ourselves with this assignment of error.

The defendants concede that when they were interviewing customers, answering their questions, recommending forms to be used by particular customers and helping them to complete the forms and in any way counseling with customers, they were engaged in the practice of law. In their brief defendants concede:

"While this court may find that the defendants did have personal contact with their customers and may have answered questions which constituted the giving of legal advice, any such legal advice by defendants should be enjoined, the forms and written instructions should not be enjoined."

[2] Defendants' basic contention is stated in their brief as follows:

"While this court may enjoin the defendants from acting in an advisory capacity to its customers in recommending or designing completed forms, the writing, advertising and sale of forms in combination with a text of material relating to the completion of those forms which text is impersonal and involves nothing discretionary between defendants and customers should not be enjoined and the trial court decree should be modified in accordance therewith."

We believe that paragraph 2 of the decree unduly restricts the activities of the defendants and cannot be sustained. In our view defendants cannot be enjoined from merely publishing or selling their divorce kits so long as the defendants have no personal contact with their customers.

We find persuasive the holding in *New York County Lawyers' Association v. Dacey*, 28 A.D.2d 161, 283 N.Y.S.2d 984, reversed 21 N.Y.2d 694, 287 N.Y.S.2d 422, 234 N.E.2d 459 (1967). There it was held that the publication, distribution and selling of Norman F. Dacey's book "How to Avoid Probate" did not constitute the practice of law since the publication was directed to the general public and not to a specific individual. The dissenting opinion in the Appellate Division, which was adopted by the Court of Appeals, stated in pertinent part:

"* * * It cannot be claimed that the publication of a legal text which purports to say what the law is amounts to legal practice. And the mere fact that the principles or rules stated in the text may be accepted by a particular reader as a solution to his problem, does not affect this. Courts and lawyers continuously use and cite texts for this very purpose. So also with forms. The publication of a multitude of forms for all

children but they don't have the proper forms for that, or they come in and they don't have service accomplished, but the things that we do the most, that I do the most often with the people is to help them fill out the forms, because they come with them blank."

The plaintiff called as witnesses only four persons who had purchased divorce kits from defendants. In each case a divorce was obtained. In one case the form submitted to the court stated erroneously that the husband was to be awarded the home when in fact the parties lived in a rented house. The error was disclosed during the divorce hearing and corrected by the trial judge.

In another case there was difficulty in obtaining service on the husband, who was a soldier stationed in Korea, and because of this complication, the customer engaged a lawyer to complete the proceeding.

In a third case the witness purchased a divorce kit and had the forms filled out by the defendants, but the forms were not used and the witness engaged a lawyer to obtain her divorce.

In the fourth case the customer purchased a divorce kit and after some delay obtained a divorce, but was dissatisfied, primarily because an automobile owned jointly with the husband was not awarded to her.

In all four of these cases it is clear that defendants' employees were flagrantly practicing law by counseling with and giving advise to the customers. However, the plaintiff did not attempt to prove that the forms were not effective if used as directed.

It may be that many laymen are not qualified on their own to select the proper forms and to complete the forms with the necessary exactitude to terminate their marriage and settle the related issues of property rights, child custody, support and visitation. However, the fact that some marriage does not justify preventing the defendants from advertising that marriage dissolution and its related issues can be accomplished by the use of the divorce kits.

The Supreme Court of Florida has taken a different view and has held that the giving of specialized advice to a general audience rather than to a particular individual constitutes the practice of law. See *The Florida Bar v. American Legal & Bus. Forms, Inc.*, 274 So.2d 225 (Fla.1973) and *The Florida Bar v. Stupica*, 300 So.2d 683 (Fla.1974).

Although defendants do not restrict the sale of their divorce kits to persons obtaining noncontested divorces, it is clear that their advertising is directed primarily to persons in that class. Two of the advertisements quoted *supra* refer particularly to "*non-contested* divorce".

The Manual for Divorce, which is the explanatory textual material included with each kit, contains on the first page immediately under the Table of Contents the following disclaimer in large type:

"PUBLISHER'S MEMO

* * * * * *

"THE SERVICES PROVIDED IN YOUR MEMBERSHIP MAY NOT BE APPLICABLE FOR EVERYONE. YOUR COUNCIL RECOMMENDS THIS SERVICE ONLY FOR THOSE WHO CAN ENTER INTO A DEFAULT CATAGORY. FOR THOSE WHO MAY SUFFER OPPOSITION FROM YOUR SPOUSE BECAUSE OF CHILD CUSTODY, OR PROPERTY DIVISION, ALIMONY, OR ANY OF THE OTHER PROBLEMS THAT HAVE ARISEN BETWEEN THE TWO PARTIES, THE COUNCIL STRONGLY RECOMMENDS THAT YOU ENGAGE THE SERVICES OF AN ATTORNEY."

[3] It should not be overlooked that ORS 9.320 provides that "any action, suit, or proceeding may be prosecuted or de-

to prosecute a suit to terminate his marriage and to settle the related issues of property rights, child custody, support and visitation without the help of either an attorney or forms obtained from defendants or any other similar source.

[4] We conclude that in the advertising and selling of their divorce kits the defendants are not engaged in the practice of law and may not be enjoined from engaging in that part of their business. We further conclude, however, that all personal contact between defendants and their customers in the nature of consultation, explanation, recommendation or advice or other assistance in selecting particular forms, in filling out any part of the forms, or suggesting or advising how the forms should be used in solving the particular customer's marital problems does constitute the practice of law and must be and is strictly enjoined.

The decree of the trial court is modified in accordance with the foregoing opinion and, as so modified, is affirmed.

The FIRST NATIONAL BANK OF OREGON, as personal representative of the Estate of Anton D. Elmer, Deceased, Appellant,

v.

MOBIL OIL CORPORATION, Respondent.

Supreme Court of Oregon,
In Banc.

Argued and Submitted July 8, 1975.

Decided Aug. 7, 1975.

Proceeding to determine timeliness of lessee's notice to renew lease was submitted for decision upon agreed statement of case. The Circuit Court, Multnomah County, Alfred T. Sulmonetti, J., held that notice was timely and lessor appealed. The Supreme Court, Tongue, J., held that statute providing that any act required to be performed on a holiday may be performed on the next succeeding business day extends to acts to be performed as provided by contracts; hence where lease required notice to renew at least 30 days prior to expiration of current term, and the 30th day prior to expiration date was a Sunday, and on the next Monday lessee mailed notice of election to renew lease which also provided that notice would be deemed given at time of mailing, notice was timely.

Affirmed.

1. Time ⇐10(10)

At common law, when the last day for the performance of an act required by contract falls on a Sunday, the act may be performed on the following day.

2. Time ⇐10(10)

Rule that when the last day for performance of an act required by contract falls on a Sunday, the act may be performed on the following day is ordinarily to be applied in landlord and tenant cases for purposes of computing time for payment of rent or for giving notice to terminate a tenancy.

3. Time ⇐10(10)

Statute providing that any act required to be performed on a holiday may be performed on the next succeeding business day and no liability or loss of rights of any kind shall result from such delay extends to acts to be performed as provided by contracts, at least unless the contract specifically designates a Sunday as the day on which an act must be performed or as the last day on which the act may be performed. ORS 27.010, 187.010(2).

4. Time ⇐10(10)

Where lease required that notice to renew be given at least 30 days prior to expiration of term, and the 30th day prior to

Exhibit “M”

In the Matter of New York County Lawyers' Association, Respondent, v. Norman F. Dacey et al., Appellants

[NO NUMBER IN ORIGINAL]

Supreme Court of New York, Appellate Division, First Department

28 A.D.2d 161; 283 N.Y.S.2d 984; 1967 N.Y. App. Div. LEXIS 3230

October 24, 1967

PRIOR HISTORY: [***1]

Matter of New York County Lawyers' Assn. v. *Dacey*, 54 Misc 2d 564, modified.

Appeal from a judgment of the Supreme Court at Special Term (Charles Marks, J.), entered September 12, 1967 in New York County, which held appellant Dacey in contempt of court and fined him $ 250 and granted an injunction against all of the appellants.

DISPOSITION: Judgment affirmed as to respondents Norman F. Dacey and Norman F. Dacey doing business as National Estate Planning Council, with $ 50 costs and disbursements to the petitioner. Under the circumstances, however, the terms of the judgment of the court insofar as it is directed against the respondents book publishers, distributors and sellers is limited to the enjoining of the acts and conduct on their part tending to promote the unlawful practice of law by Dacey in this State. Therefore, the injunctive provisions of said judgment, as affecting the respondents Crown Publishers, Inc., Doubleday & Co. Inc. and Brentano's Inc. are modified to restrain them from the further publication, advertisement, distribution and sale in New York of the present book "How To Avoid Probate!", and of any modification thereof which purports to induce lay persons [***2] to rely upon the legal advice or expertise of Dacey in the selection, use, completion or execution of legal forms, instruments or writings for the purpose of establishing any jural relationship or effecting the transfer or disposition of property; and said judgment is otherwise affirmed as to said last-named respondents, without costs and without disbursements.

Settle order on notice.

HEADNOTES:

Attorney and client -- unlawful practice of law -- author, nonlawyer, of book containing legal advice and detachable forms of wills and deeds of trust with do-it-yourself instructions to laymen, "assumes to practice law" (Judiciary Law, § 750, subd. B) and was properly adjudged in contempt of court -- publishers and booksellers are enjoined from advertising, distributing or selling such book in New York.

1. The first-named respondent, who does business under the name of National Estate Planning Council, and who is not a lawyer, "assumes to practice law" (Judiciary Law, § 750, subd. B; Penal Law, §§ 270, 271, 280, subd. 3), and was therefore properly adjudged in contempt of court. He authored a book called "How To Avoid Probate!" consisting of about 55 pages of text and about 310 pages [***3] containing 26 declaration and deed of trust forms, 2 deed forms, 5 revocation of trust forms, 1 form of amendment of deed of trust, and 12 will forms, each in duplicate and perforated for removal from the book, and each with a page or more of instructions to laymen on how to use these "legally correct" forms so as to "avoid the delay, expense and publicity of probate of * * * your home * * * your bank account * * * your stocks and bonds * * * your automobile * * * your close corporation * * * your mutual fund shares * * * your small unincorporated business * * * your personal effects". Also in the book is an order form whereby a purchaser may order

he book.

[**997] Here the claim of unauthorized practice of law rests upon the writing and publication of this book of vhich some 600,000 copies have been sold. Petitioner complains also of the advertising which appears on the acket of the book. The advertising in question refers to Dacey as one of America's leading professional estate ılanners. The book, as the title indicates, attempts to inform the purchaser how to avoid probate.

'etitioner asserts that by the appellants' representations to the public they were selling legal advice and they vere representing that Dacey was an expert qualified and competent [*173] to give such legal advice. 'etitioner alleges the scheme and plan created by Dacey, and carried into effect by Crown Publishers Inc., vho published the book, and Doubleday & Co., Inc. and Brentano's Inc., who sold and distributed the book, :onstitute the unauthorized practice of law; that Crown, Doubleday and Brentano's are equally responsible)ecause they have been engaged in aiding and abetting the [***28] unauthorized practice of law and that ın injunction may issue under subdivision B of section 750 of the Judiciary Law, which section they assert is :lear and unambiguous.

)acey contends that his acts cannot, as a matter of law, constitute the unauthorized practice of law in the ıbsence of proof of the giving of specific advice to a specific individual about his particular problems; that the)ublication and distribution of a book containing forms is not the equivalent of giving specific advice to ;pecific individuals about their particular problems, and does not constitute the unauthorized practice of law.

'he defendants urge several defenses based on contentions that subdivision B of section 750 violates lifferent articles of the Federal Constitution. In the view taken it is not necessary to consider these :ontentions, and attention is directed only to the question of whether the publication of this book constitutes)ractice of the law within the meaning of the section.

Stripped of the arguments and the contentions of the various parties, the question may be briefly and baldly :xpressed: Does the writing, publication, advertising, sale and distribution of "How To Avoid Probate!" [***29] constitute the unauthorized practice of law within the meaning of subdivision B of section 750? It :annot be claimed that the publication of a legal text which purports to say what the law is amounts to legal)ractice. And the mere fact that the principles or rules stated in the text may be accepted by a particular 'eader as a solution to his problem does not affect this. Courts and lawyers continuously use and cite texts 'or this very purpose. So also with forms. The publication of a multitude of forms for all manner of legal ;ituations is a commonplace activity and their use by the Bar and the public is general. In fact, many statutes ınd court rules contain the forms to be used in connection with them. Apparently it is urged that the :onjoining of these two, that is, the text and the forms, with advice as to how the forms should be filled out, :onstitutes the [**998] unlawful practice of law. But that is the situation with many approved and accepted :exts.

[*174] Dacey's book is sold to the public at large. There is no personal contact or relationship with a)articular individual, Nor does there exist that relation of confidence and trust so necessary to the status [***30] of attorney and client. This is the essential of legal practice -- the representation and the advising of a particular person in a particular situation. The lectures of a law school professor are not legal)ractice for the very reason that the principles enunciated or the procedures advised do not refer to any activity in immediate contemplation though they are intended and conceived to direct the activities of the students in situations which may arise. Moreover, there is no claim here as there was in the Connecticut proceeding (*Grievance Committee of Bar of Fairfield County* v. *Dacey*, 154 Conn. 129, 222 A. 2d 339, rehearing den. 387 U.S. 938) that Dacey, in effect, prepared instruments tailored to the particular needs of his customers.

Special Term referred to and placed a measure of reliance on the determination of the Connecticut court in making its own determination. In the Connecticut proceeding against Dacey it was determined that in addition to the preparation of a 30-page booklet Dacey prepared trusts and wills adapted to clients' needs providing, at the same time, for large potential profits to himself in the sale of Wellington Fund shares on which he received [***31] a 6% commission. The court declared, when Dacey prepared wills and trusts for his customers and advised, as to the desirability in their circumstances, of the specific wills or trusts so prepared for them he engaged in the illegal practice of law. Certainly that case may readily be distinguished.

At most the book assumes to offer general advice on common problems, and does not purport to give personal advice on a specific problem peculiar to a designated or readily identified person.

"How To Avoid Probate!" may be purchased by anyone willing to pay the purchase price. One is free to

Exhibit "N"

For specific location and call#
see holdings information below.

Author	Sutherland, J. G. (Jabez Gridley), 1825-1902
Title	Statutes and statutory construction / by J. G. Sutherland.
Edition	Revision of Sands fourth edition / by Norman J. Singer.
Publisher	Wilmette, Ill. : Callaghan, 1984-1990.
Description	v. ; 25 cm.
Subjects	Statutes -- United States. Legislation -- United States. Law -- United States -- Interpretation and construction.
Notes	Kept up to date by pocket parts. On spine: Sutherland statutory construction.
Bibliography	Includes bibliographical references.
Local Note	Being gradually absorbed, vol. by vol., into 5th ed; replaced volumes in storage.
Other Author	Singer, Norman J.
Other Title	Sutherland statutory construction
Bib Number	990200
LCCN	84022974
Control #	LAA4027LW
Location/Call #	Law Library Non Circulating KF425 .S8 1984 (j) v. 2
Location/Call #	Quinney Law Storage KF425 .S8 1984 (j)

and Statutory Construction

SIXTH EDITION

By NORMAN J. SINGER
PROFESSOR OF LAW
UNIVERSITY OF ALABAMA

2000 Revision

VOLUME 2B

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tion existed''.[28]

§ 51.03 Statutes deemed to be in pari materia p. 201

Statutes are considered to be in pari materia when they relate to the

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[28]Western States Newspapers, Inc. v. Gehringer, 203 Cal. App. 2d 793, 22 Cal. Rptr. 144 (4th Dist. 1962).

United States. Water Quality Ass'n Employees' Benefit Corp. v. U.S., 795 F.2d 1303 (7th Cir. 1986).

Alabama. House v. Cullman County, 593 So. 2d 69 (Ala. 1992).

Connecticut. Doe v. Statewide Grievance Committee, 41 Conn. App. 671, 677 A.2d 960 (1996), certification granted in part, 239 Conn. 905, 682 A.2d 999 (1996) and judgment rev'd on other grounds, 240 Conn. 671, 694 A.2d 1218 (1997).

Kansas. Fought v. State, 14 Kan. App. 2d 17, 781 P.2d 742 (1989).

North Dakota. Kroh v. American Family Ins., 487 N.W.2d 306 (N.D. 1992).

Tennessee. State v. Davis, 654 S.W.2d 688 (Tenn. Crim. App. 1983).

Virginia. Williams v. Matthews, 248 Va. 277, 448 S.E.2d 625 (1994).

Richards & Stearns, Shareholder By-Laws Requiring Boards of Directors to Dismantle Rights Plans Are Unlikely to Survive Scrutiny Under Delaware Law, 54 Bus Law 607 (1999).

the same purpose or object.[2]

The rule of in pari materia is generally used when there is some doubt or ambiguity in the wording of the statute under consideration.[3] Characterization of the object or purpose is more important than characterization of subject matter in determining whether different statutes are closely enough related to justify interpreting one in light of the other.[4] Yet courts have stated that each section of a law which deals with the same subject matter must be read in pari materia with other sections on the same subject.[5] The doctrine of in pari materia for statutory construction may be applied to executive orders.[6]

In light of these rules there have been a plethora of decisions on the issue of in pari materia. It has been held that sales tax and use tax statutes are construed in pari materia.[7] Because a statute prohibiting driving while intoxicated and an implied consent statute were both regarded as serving the common purpose of highway safety, they were held to be in pari materia.[8] Basic goals, in New Jersey, of the Uniform Commercial Code and the Motor Vehicle Certificate of Ownership Law, to protect the innocent or good faith purchasers are in harmony.[9] The Federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Minnesota Environmental Response and Liability Act (MERLA) are in pari materia.[10] Federal employees are permitted as a matter of course to bring suit under both

Exhibit "O"

situation.[33] It has been said that the "total corpus of pertinent law" may be considered.[34] It should also be noted that courts have held that application of the rule must be applied before any other rules of statutory construction.[35] But a definition which relates specifically to a term as used in a single article of a code cannot be used in pari materia with other articles.[36]

Since the purpose of an amendment is to make changes in the act being amended, great caution should be used in holding statutes in pari materia where an amendment is involved.[37] Nevertheless it has been allowed that "an amendatory act shall be construed in context with the act which it is designed to amend."[38] An amended act comprises part of the legislative history of the amending act.[39]

To be in pari materia, statutes need not have been enacted simultaneously[40] or refer to one another.[41] A marijuana trafficking statute and a statute defining "second or subsequent offense" as any drug offense

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[33]**Pennsylvania.** Bruzzi v. Bruzzi, 332 Pa. Super. 346, 481 A.2d 648 (1984).

[34]**United States.** Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 90 S. Ct. 1583, 26 L. Ed. 2d 199 (1970) (overruling on other grounds recognized by, Local Lodge No. 1266, Intern. Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Panoramic Corp., 668 F.2d 276 (7th Cir. 1981)) and (overruling recognized by, Consolidated Rail Corp. v. Brotherhood of Maintenance of Way Employees, 847 F. Supp. 1294 (E.D. Pa. 1994)); U. S. v. General Motors Corp., 518 F.2d 420 (D.C. Cir. 1975).

Alabama. Kirkland v. State, 529 So. 2d 1036 (Ala. Crim. App. 1988).

Wyoming. Matter of ALJ, 836 P.2d 307 (Wyo. 1992).

[35]**Indiana.** Northwest Associates v. Board of Assessors of Burlington, 386 Mass. 1006, 437 N.E.2d 235 (1982).

[36]**West Virginia.** Waldron v. Leevale Collieries, 127 W. Va. 443, 33 S.E.2d 227 (1945).

[37]**United States.** Locomotive Boiler Inspection Act and Federal Employers' Liability Act should be construed together whether or not the former is an amendment to the latter. Green v. River Terminal Ry. Co., 585 F. Supp. 1019 (N.D. Ohio 1984), judgment aff'd, 763 F.2d 805 (6th Cir. 1985).

Oklahoma. Letteer v. Conservancy Dist. No. 30, in Tulsa, Osage, Rogers and Washington Counties, 1963 OK 218, 385 P.2d 796 (Okla. 1963).

See ch 22.

[38]Hutter v. Spenny, 8 Mich. App. 719, 155 N.W.2d 250 (1967).

Califonia. In re Lee, 78 Cal. App. 3d 753, 144 Cal. Rptr. 528 (3d Dist. 1978).

[39]**Califonia.** Fair v. Fountain Valley School Dist., 90 Cal. App. 3d 180, 153 Cal. Rptr. 56 (4th Dist. 1979).

See ch 48.

[40]**United States.** A code section providing liability for court costs would be read together with another section setting attorney's fees where the former was reenacted as

Exhibit “P”

stands in the position of parens patriae.[4] The rule that legislative provisions which are in pari materia should be construed together applies also to rules of court.[5]

Tennessee. State ex rel. Strong v. Strong, 175 Tenn. 291, 133 S.W.2d 996 (1939); Lyons v. Rasar, 872 S.W.2d 895, 90 Ed. Law Rep. 504 (Tenn. 1994); Johnson v. Johnson, 40 Tenn. App. 655, 292 S.W.2d 472 (1956).

Texas. Shelby v. State, 479 S.W.2d 31 (Tex. Crim. App. 1972); Madeley v. Trustees of Conroe Independent School Dist., 130 S.W.2d 929 (Tex. Civ. App. Beaumont 1939), writ dismissed, judgment correct; Harrington v. State, 385 S.W.2d 411 (Tex. Civ. App. Austin 1964), writ granted, (July 14, 1965) and judgment rev'd on other grounds, 407 S.W.2d 467 (Tex. 1966); Texas Water Com'n v. Acker, 774 S.W.2d 270 (Tex. App. Austin 1989), writ granted, (Jan. 24, 1990) and judgment aff'd and remanded on other grounds, 790 S.W.2d 299 (Tex. 1990), reh'g of cause overruled, (June 13, 1990).

Utah. Murray City v. Hall, 663 P.2d 1314 (Utah 1983).

Vermont. Board of Trustees of Kellogg-Hubbard Library, Inc. v. Labor Relations Bd., 162 Vt. 571, 649 A.2d 784 (1994).

Virginia. Branch v. Com., 14 Va. App. 836, 419 S.E.2d 422 (1992).

Washington. Clark v. Pacificorp, 118 Wash. 2d 167, 822 P.2d 162 (1991); State v. Andrews, 43 Wash. App. 49, 715 P.2d 526 (Div. 3 1986).

West Virginia. Concerned Loved Ones and Lot Owners Ass'n of Beverly Hills Memorial Gardens v. Pence, 181 W. Va. 649, 383 S.E.2d 831 (1989); West Virginia Dept. of Health and Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 27 (1993).

Wisconsin. Sentinel News Co. v. Industrial Commission, 224 Wis. 355, 271 N.W. 413 (1937); State v. Temby, 108 Wis. 2d 521, 322 N.W.2d 522 (Ct. App. 1982); Northwest General Hosp. v. Yee, 109 Wis. 2d 644, 327 N.W.2d 186 (Ct. App. 1982), decision rev'd on other grounds, 115 Wis. 2d 59, 339 N.W.2d 583 (1983); Schwetz v. Employers Ins. of Wausau, 126 Wis. 2d 32, 374 N.W.2d 241, 27 Ed. Law Rep. 946 (Ct. App. 1985) (overruled on other grounds by, Colby v. Columbia County, 202 Wis. 2d 342, 550 N.W.2d 124 (1996)); State v. Thomas, 128 Wis. 2d 93, 381 N.W.2d 567 (Ct. App. 1985), review denied; Rossie v. State/Dept. of Revenue, 133 Wis. 2d 341, 395 N.W.2d 801, 65 A.L.R.4th 1191 (Ct. App. 1986); Parks v. City of Madison, 199 Wis. 2d 122, 545 N.W.2d 519 (Ct. App. 1995).

Wyoming. Carpenter & Carpenter v. Kingham, 56 Wyo. 314, 109 P.2d 463 (1941), opinion modified on denial of reh'g, Carpenter & Carpenter v. Kingham, 56 Wyo. 314, 110 P.2d 824 (1941).

Gomez, The Consequences of Nonappearance: Interpreting New Section 242B of the Immigration and Nationality Act, 30 San Diego L Rev 75 (1993).

[4]**Michigan.** Michigan Ass'n of Intermediate Special Educ. Administrators v. Department of Social Services, 207 Mich. App. 491, 526 N.W.2d 36, 96 Ed. Law Rep. 1127 (1994).

[5]**United States.** Schwab v. Erie Lackawanna R. Co., 438 F.2d 62, 12 A.L.R. Fed. 863 (3d Cir. 1971); Julian v. Equifax Check Services, Inc., 178 F.R.D. 10, 40 Fed. R. Serv. 3d 944 (D. Conn. 1998); U.S. v. Lara, 181 F.3d 183 (1st Cir. 1999), cert. denied, 120 S. Ct. 432 (U.S. 1999).

The court will not blindly adopt another jurisdiction's interpretation on the basis that a statute of another jurisdiction has been adopted. To do so would be a sacrifice of the deciding courts reasoned analysis and independent thinking. Custodio v. Boonprakong, 1999 Guam 5, 1999 WL 104490 (Guam 1999).

Exhibit "Q"

together;[23] mail and wire fraud statutes have been held to be in pari materia so that cases concerning one apply equally to the other;[24] the Equal Pay Act, Title VII of the Civil Rights Act of 1964 and the Classification Act are all in pari materia as their purpose is to provide uniformity of treatment for all employees;[25] the sex discrimination provisions of the civil rights employment discrimination statute must be read in harmony with the provisions of the Equal Pay Act when determining the appropriate back pay award;[26] the extradition provision of the Uniform Reciprocal Enforcement of Support Act and the Uniform Criminal Extradition Act must be construed together when applied in criminal extradition proceedings for the crime of nonsupport;[27] the no-fault and uninsured motorist statutes both relate to losses from injuries occurring in connection with motor vehicles and should be read in pari materia since they relate to the same class of persons.[28]

In like manner the prohibition against driving under the influence of alcohol mirrors the prohibition against operating watercraft under the influence of alcohol or drugs of abuse and to that extent the two statutes should be construed in a consistent and harmonious fashion.[29]

It is also important to determine what other forms of enactment might be included in a decision. For example, it has been held that Rules of Civil Procedure promulgated by a Supreme Court have the same force and effect as statutes passed by the legislature.[30]

Statutes have been held to be in pari materia whether independent or amendatory in form; whether in the form of a complete enactment dealing with a single, limited subject matter or of sections in a code or revi-

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[23]**New York.** Matter of Estate of Seaman, 78 N.Y.2d 451, 576 N.Y.S.2d 838, 583 N.E.2d 294 (1991).

[24]**United States.** D'Iorio v. Adonizio, 554 F. Supp. 222 (M.D. Pa. 1982).

[25]**United States.** Grumbine v. U.S., 586 F. Supp. 1144 (D.D.C. 1984).

[26]**United States.** Crabtree v. Baptist Hosp. of Gadsden, Inc., 749 F.2d 1501 (11th Cir. 1985).

[27]**Georgia.** In re Pace, 250 Ga. 276, 297 S.E.2d 255 (1982).

[28]**Pennsylvania.** Tucci v. State Farm Ins. Co., 503 Pa. 447, 469 A.2d 1025 (1983).

[29]**Ohio.** State v. LePard, 52 Ohio App. 3d 83, 557 N.E.2d 166 (6th Dist. Ottawa County 1989).

[30]**Pennsylvania.** The statutory provision and the Rules of Civil Procedure relate to the same subject matter, partition of property, and therefore should be read in pari materia. Lohmiller v. Weidenbaugh, 503 Pa. 329, 469 A.2d 578 (1983).

Exhibit "R"

unencumbered manner.[9] When the language of a state act is adopted from federal legislation, courts will ordinarily construe the state statute in accordance with the construction given the federal statute.[10] In like manner, it has been held that the power to enact a county resolution on a matter that is also subject of a state statute is permitted if the resolution and the statute can be harmonized.[11] The Michigan Supreme Court held that the two statutes are construed together as the intent of both statutes in question is aimed at the same situation. One provides a remedy for highway defects and the other intends to provide broad relief to designated beneficiaries who have sustained a loss as a result of a wrongful death.[12] The Iowa Supreme Court has held that the availability of different penalties for essentially the same conduct, alone is not enough to prefer one statute over the other.[13]

Provisions in one act which are omitted in another on the same subject matter will be applied when the purposes of the two acts are consistent.[14] Prior statutes relating to the same subject matter are compared with the new provision; if it is possible by reasonable

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[9]Carter v. Brodrick, 644 P.2d 850 (Alaska 1982).

[10]

Connecticut. Board of Public Utilities Com'rs of City of Norwich v. Yankee Gas Services Co., 236 Conn. 287, 672 A.2d 953 (1996).

Massachusetts. Vasys v. Metropolitan Dist. Com'n, 387 Mass. 51, 438 N.E.2d 836 (1982).

[11]**Iowa.** Decatur County v. Public Employment Relations Bd., 564 N.W.2d 394 (Iowa 1997).

[12]Endykiewicz v. State Highway Com'n, 414 Mich. 377, 324 N.W.2d 755 (1982).

[13]**Iowa.** State v. Peters, 525 N.W.2d 854 (Iowa 1994).

[14]**United States.** Milas v. U.S., 42 Fed. Cl. 704 (1999), aff'd, 1999 WL 825288 (Fed. Cir. 1999). U.S. v. Fixico, 115 F.2d 389 (C.C.A. 10th Cir. 1940); Richerson v. Jones, 551 F.2d 918, 43 A.L.R. Fed. 191 (3d Cir. 1977).

The deliberate selection of language so differing from that used in earlier Acts indicates that a change of law was intended. Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 115 S. Ct. 2227, 132 L. Ed. 2d 375 (1995).

Alaska. Citizens Coalition for Tort Reform, Inc. v. McAlpine, 810 P.2d 162 (Alaska 1991).

Idaho. The amendment recognizes that the main purpose of punitive damages (deterrence) is destroyed when the wrongdoer dies. The fact that a similar amendment was not made to the later statute is evidence that the legislature did not intend to allow living wrongdoers to escape the imposition of punitive damages. Gavica v. Hanson, 101 Idaho 58, 608 P.2d 861 (1980) (overruled on other grounds by, Sterling v. Bloom, 111 Idaho 211, 723 P.2d 755 (1986)).

Illinois. People ex rel. Shriver v. Cowen, 283 Ill. 308, 119 N.E. 335 (1918); Ketcham

Exhibit "S"

where the same word or term is used in different statutory sections that are similar in purpose and content . . . or where . . . a word is used more than once in the same section.''[25] The same rule has been applied even where the language is only substantially similar.[26] But if words used in a prior statute to express a certain meaning are omitted, it will be presumed that a change of meaning was intended.[27] Thus it has been said ''where a statute, with reference to one subject contains a given

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See City of Burlington v. Turner, 336 F. Supp. 594 (S.D. Iowa 1972), judgment modified on other grounds, 471 F.2d 120 (8th Cir. 1973) (''identical language in different statutes should be given much the same meaning'').

Cf. State ex rel. American Piano Co. v. Superior Court for King County, 105 Wash. 676, 178 P. 827 (1919).

When subject matter is different, see Jennings v. Connecticut Light & Power Co., 140 Conn. 650, 103 A.2d 535 (1954).

[25]C.I.R. v. Ridgeway's Estate, 291 F.2d 257 (3d Cir. 1961).

Connecticut. Connecticut Light and Power Co. v. Costle, 179 Conn. 415, 426 A.2d 1324 (1980); In re Juvenile Appeal (83-CD), 189 Conn. 276, 455 A.2d 1313, 38 A.L.R.4th 736 (1983).

Missouri. Citizens Bank and Trust Co. v. Director of Revenue, State of Mo., 639 S.W.2d 833 (Mo. 1982).

New Mexico. State v. Johnson, 124 N.M. 647, 1998, 1998 -NMCA- 019, 954 P.2d 79 (Ct. App. 1997), cert. denied, 124 N.M. 311, 950 P.2d 284 (1998).

North Dakota. State v. Coutts, 364 N.W.2d 88 (N.D. 1985).

Wisconsin. Adoption of Abigail M., 221 Wis. 2d 781, 586 N.W.2d 21 (Ct. App. 1998).

[26]**Georgia.** Graham v. Tallent, 235 Ga. 47, 218 S.E.2d 799 (1975).

Kentucky. Commonwealth v. Bates, 235 Ky. 763, 32 S.W.2d 334 (1930).

[27]**United States.** Chertkof v. U. S., 676 F.2d 984 (4th Cir. 1982); Hazardous Waste Treatment Council v. U.S.E.P.A., 861 F.2d 270 (D.C. Cir. 1988).

Alabama. Kilgore v. Swindle, 219 Ala. 378, 122 So. 333 (1929).

Califonia. Craven v. Crout, 163 Cal. App. 3d 779, 209 Cal. Rptr. 649 (1st Dist. 1985).

District of Columbia. Smith v. District of Columbia Dept. of Employment Services, 548 A.2d 95 (D.C. 1988).

Illinois. Lingwall v. Hoener, 108 Ill. 2d 206, 91 Ill. Dec. 166, 483 N.E.2d 512 (1985); In re Marriage of Sutton, 136 Ill. 2d 441, 145 Ill. Dec. 890, 557 N.E.2d 869 (1990).

Indiana. Sekerez v. Youngstown Sheet & Tube Co., 166 Ind. App. 563, 337 N.E.2d 521 (3d Dist. 1975).

Massachusetts. School Committee of Brockton v. Teachers' Retirement Bd., 393 Mass. 256, 471 N.E.2d 61, 21 Ed. Law Rep. 651 (1984); Petrucci v. Board of Appeals of Westwood, 45 Mass. App. Ct. 818, 702 N.E.2d 47 (1998), review denied, 707 N.E.2d 1079 (Mass. 1999).

Missouri. State ex rel. Hilbert v. Glaves, 268 Mo. 100, 186 S.W. 685 (1916).

However, a provision in one act omitted in another act on the same subject matter, when not inconsistent in purpose, will be applied under the subsequent enactment.

provision, the omission of such provision from a similar statute

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manner which reflects the integrity of both. Farmer's Bank of Antonia v. Kostman, 577 S.W.2d 915 (Mo. Ct. App. W.D. 1979).

New York. In re George Ringler & Co., 145 A.D. 361, 130 N.Y.S. 62 (1st Dep't 1911), rev'd on other grounds, 204 N.Y. 30, 97 N.E. 593 (1912).

Ohio. State ex rel. Northwestern Mut. Life Ins. Co. v. Tomlinson, 99 Ohio St. 233, 124 N.E. 220 (1919).

Pennsylvania. In re State Highway Route No. 72, 265 Pa. 369, 108 A. 820 (1919); Com. v. Bigelow, 484 Pa. 476, 399 A.2d 392 (1979).

Where words of a later statute differ from those of a previous one on the same subject, they presumably are intended to have a different construction. Com. v. Buzak, 197 Pa. Super. 514, 179 A.2d 248 (1962).

Virginia. Williams v. Matthews, 248 Va. 277, 448 S.E.2d 625 (1994).

Washington. The omission of a similar provision from a similar statute usually indicates a different legislative intent. Clallam County Deputy Sheriff's Guild v. Board of Clallam County Com'rs, 92 Wash. 2d 844, 601 P.2d 943 (1979).

West Virginia. Hall v. Baylous, 109 W. Va. 1, 153 S.E. 293, 69 A.L.R. 527 (1930).

Wisconsin. State v. Welkos, 14 Wis. 2d 186, 109 N.W.2d 889 (1961).

But cf. Board of Com'rs of Jackson County v. Branaman, 169 Ind. 80, 82 N.E. 65 (1907); State ex rel. American Piano Co. v. Superior Court for King County, 105 Wash. 676, 178 P. 827 (1919).

concerning a related subject is significant to show that a different intention existed''.[28]

§ 51.03 Statutes deemed to be in pari materia

Statutes are considered to be in pari materia when they relate to the

[28]Western States Newspapers, Inc. v. Gehringer, 203 Cal. App. 2d 793, 22 Cal. Rptr. 144 (4th Dist. 1962).

United States. Water Quality Ass'n Employees' Benefit Corp. v. U.S., 795 F.2d 1303 (7th Cir. 1986).

Alabama. House v. Cullman County, 593 So. 2d 69 (Ala. 1992).

Connecticut. Doe v. Statewide Grievance Committee, 41 Conn. App. 671, 677 A.2d 960 (1996), certification granted in part, 239 Conn. 905, 682 A.2d 999 (1996) and judgment rev'd on other grounds, 240 Conn. 671, 694 A.2d 1218 (1997).

Kansas. Fought v. State, 14 Kan. App. 2d 17, 781 P.2d 742 (1989).

North Dakota. Kroh v. American Family Ins., 487 N.W.2d 306 (N.D. 1992).

Tennessee. State v. Davis, 654 S.W.2d 688 (Tenn. Crim. App. 1983).

Virginia. Williams v. Matthews, 248 Va. 277, 448 S.E.2d 625 (1994).

Richards & Stearns, Shareholder By-Laws Requiring Boards of Directors to Dismantle Rights Plans Are Unlikely to Survive Scrutiny Under Delaware Law, 54 Bus Law 607 (1999).

Exhibit "T"

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